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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Counsel:
	)	
HER MAJESTY THE QUEEN,	)	for the Crown:
	)	Craig R. Savage
	)	
- and -	)	
	)	for the Accused:
MITCHELL BLOSTEIN,	)	Hymie Weinstein, Q.C. and
	)	Lisa D. Labossière
Accused.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	June 28, 2013

ABRA, J.

[1] The accused, Mitchell Blostein, is charged with dangerous operation of a motor vehicle causing death contrary to s. 249(4) of the ***Criminal Code***.

[2] Shortly before 4:00 p.m. on October 18, 2010, the accused was driving a white, 1996 Chrysler Concord (the "vehicle"), north on Provincial Road 207 ("PR 207") when he struck the victim, Brittany Murray. She was performing flagging duties with a construction crew from Mulder Construction that was repaving the road. Ms. Murray died as a result of the injuries that she sustained in the collision.

[3] An Agreed Statement of Facts was filed at the commencement of the trial. A total of five witnesses testified for the Crown.

[4] In addition, the transcript of testimony from the preliminary hearing of Constable Joel Bernardin of the Royal Canadian Mounted Police ("R.C.M.P.") was filed as an exhibit with the consent of the accused. Constable Bernardin is a collision reconstruction expert. He provided opinion evidence about the collision that resulted in the death of Ms. Murray.

[5] The other exhibits that were filed by consent included:

- Constable Bernardin's written report, along with photographs that he had taken of the scene of the collision;
- photographs that had been taken by an investigator with the Manitoba Department of Workplace Safety and Health ("WSH"); and
- the autopsy report.

[6] At the conclusion of the Crown's case, the accused testified on his own behalf.

FACTS

[7] PR 207 runs in a north and south direction between Provincial Trunk Highway 15 ("PTH 15") and the Trans Canada Highway No. 1 ("TCH 1"). Virtually all of PR 207, between PTH 15 and TCH 1, is a straight highway with no significant curves. PR 207 is two lanes and normally has one lane for northbound traffic and one lane for southbound traffic. When the collision occurred, the weather was clear and sunny. The road was dry.

[8] There had been two stages of the repaving construction contract. The first stage had taken place between July 23rd and August 30, 2010. There was then a break in construction and it had resumed on October 8, 2010.

[9] When construction was actually being done, at least two flaggers were on duty. One flagger was at the north end of the construction area and one flagger was at the south end. At any given time, only one lane of traffic was open for vehicles at the specific location where work was being done.

[10] The purpose of one flagger was to stop northbound traffic at any given time when southbound traffic was using the one lane that was open. The other flagger would in turn stop southbound traffic for northbound traffic to use the one lane that was open.

[11] In the afternoon of October 18, 2010, Ms. Murray was working as the flagger at the south end of the construction zone and was responsible for controlling northbound traffic. Presumably another flagger was working somewhere north of the construction zone, controlling the southbound traffic.

[12] According to the photographs taken by the WSH inspector, at a location south of the construction area, there were two orange signs with black printing, one above the other. The top sign, which is the larger of the two, had the printed words "Construction Area." The smaller sign beneath it had printing that read "Next 7 km." Under the smaller sign were three orange coloured boards with black stripes.

[13] Approximately 150 meters north of that initial signage was another orange sign depicting in black a worker using a shovel. There was no wording on that sign.

[14] Approximately 150 meters north of the second sign was a third sign, white in colour with black printing that read "Maximum 60 When Passing Workers."

[15] Approximately 150 meters north of the third sign was an orange sign depicting in black a worker holding a flag. There was no wording on that sign.

[16] Approximately 150 meters north of that fourth sign were a series of coloured plastic drums on the shoulder of the road. There was also an orange sign depicting in black a vehicle appearing to tip off the edge of the road. Presumably this sign meant that there was not much shoulder beside the paving.

[17] Approximately 150 meters south of the scene of the collision, was an orange sign depicting in black a dump truck and a two lane highway. It is supposedly meant to depict that trucks might be turning.

[18] The photographs taken by Constable Bernardin and by WSH show some orange polyposts that apparently divided the northbound and southbound lanes of traffic during construction. However, there was no evidence as to where the polyposts began and ended in the construction zone.

[19] With the exception of the truck turning sign, there was no other evidence tendered as to the distances between any of the aforementioned signs and the actual location of the collision.

[20] At the time of the collision, there were no workers doing road construction in close proximity to Ms. Murray. All of the workers were some distance north of where Ms. Murray was located. Apparently no one was near Ms. Murray because none of the witnesses who testified for the Crown actually saw the collision.

[21] The Crown witness, Ryan Doerksen, was an employee with the Manitoba Department of Infrastructure and Transportation ("MIT"). He was responsible for inspecting the ongoing construction. His duties included checking the density of the asphalt that was being laid.

[22] According to Mr. Doerksen, he was working approximately 100-200 meters north of the location where the collision occurred. His attention was initially drawn to a group of people who were milling around some distance south of him. Shortly thereafter, a vehicle pulled up and the driver advised Mr. Doerksen that a flagger had been hit.

[23] Mr. Doerksen got into his vehicle and immediately drove in reverse to the site of the collision. He saw the accused in the driver's seat of his vehicle screaming hysterically. Mr. Doerksen saw Ms. Murray lying on the ground at the side of the road.

[24] According to Mr. Doerksen, Ms. Murray was wearing an orange vest with yellow reflective stripes and steel toed work boots. A hard hat, which Mr. Doerksen assumed belonged to Ms. Murray, was lying nearby in the middle of the northbound lane. Also lying nearby was a paddle that Ms. Murray had

apparently been carrying. It had the word "Stop" on one side and "Slow" on the other side. Mr. Doerksen saw an iPod lying on the ground near Ms. Murray.

[25] Mr. Doerksen immediately started to perform CPR on Ms. Murray. Members from the Springfield Fire Department arrived shortly thereafter. They took over resuscitation and treatment of Ms. Murray.

[26] Ryan Fortescue was a firefighter and paramedic with the Springfield Fire Department. He was working on a rescue truck with three or four other firefighters. They were the first responders on the scene.

[27] Mr. Fortescue assisted in placing Ms. Murray in an ambulance. He then accompanied Ms. Murray to St. Boniface General Hospital. En route he performed defibrillation in an attempt to revive Ms. Murray. According to the autopsy report, Ms. Murray died in hospital of blunt head trauma.

[28] Mr. Fortescue noted that there were small earphones in each of Ms. Murray's ears with a wire connected to each of them. He cut the wire so that it did not obstruct his treatment of Ms. Murray. Mr. Fortescue also noticed an iPod on a shelf in the ambulance. He assumed that someone had placed the iPod there while the ambulance was still at the scene of the collision.

[29] Ken Welchinski was driving north on PR 207 on his way home from work in Winnipeg. He drove PR 207 on a daily basis to and from work. Mr. Welchinski noticed a vehicle in front of him that was also northbound on PR 207. He estimated that there was a couple of hundred meters between his vehicle and the vehicle in front.

[30] Mr. Welchinski testified that the traffic on PR 207 at the time was very light. According to Mr. Welchinski, there was nothing abnormal about the manner in which the vehicle in front of him was being driven.

[31] Mr. Welchinski was aware of the construction zone on PR 207. He estimated that he was driving at approximately the speed limit of 90 km/h, but he decelerated to approximately 80 km/h when he went by the truck turning sign. However, this estimate of speed was not based upon him looking at his speedometer. He based it more on the fact that he usually drives at approximately that speed and on the feel of his vehicle.

[32] Mr. Welchinski testified that, when he decelerated, it resulted in a slight increase in the gap between him and the vehicle in front. However, Mr. Welchinski testified that, at no time, did he feel that the vehicle in front of him was going at an excessive rate of speed.

[33] Shortly thereafter, Mr. Welchinski saw debris fly in the air approximately 100 meters north of him. He continued driving and then saw Ms. Murray lying on the shoulder of the road face down. The vehicle that had been in front of Mr. Welchinski had pulled over to the side of the road.

[34] Mr. Welchinski was aware that the construction zone was controlled by flaggers. He testified that he did not see any flagger before he saw the debris fly into the air.

[35] Mr. Welchinski noted that there were no actual construction workers at or near the scene of the collision. All of the workers were at least 150 meters north.

[36] Mr. Welchinski called 911 to summons the ambulance. Initially he saw the accused out of his vehicle. The accused was clearly distraught. He was screaming and seemed to be walking in circles. The accused then got back into his vehicle.

[37] Constable Wayne Goetz of the R.C.M.P. detachment in Oakbank, Manitoba, attended the collision scene. When he arrived, the accused was sitting in the driver's seat of the vehicle. According to Constable Goetz, the accused was obviously distraught and hysterical.

[38] When Constable Goetz spoke to the accused, the accused repeatedly said that he did not see Ms. Murray. The accused also said numerous times that he did not want to live if the woman died.

[39] The accused's comments caused Constable Goetz sufficient concern that, when members of the accused's family later attended the scene to assist the accused, Constable Goetz told the family members that he was concerned about the accused's safety.

[40] Constable Goetz also testified that he had run a check on the accused's driving record. The accused had never been convicted of any offence under either ***The Highway Traffic Act***, C.C.S.M., c. H60, or the ***Criminal Code***.

[41] Later in his investigation, Constable Goetz was given a broken cell phone and an iPod, which he assumed had belonged to Ms. Murray.

[42] Barry Thompson was the Safety Coordinator employed by Mulder Construction. During the construction on PR 207, Mr. Thompson attended the site approximately two or three times each week. He was not present, however, at the time of the collision between Ms. Murray and the accused's vehicle.

[43] According Mr. Thompson, it was the responsibility of the flaggers to supervise the safe movement of traffic through the construction zone. He testified that Mulder Construction had been responsible for placing all of the signage on PR 207 south of the construction site, hereinbefore described. The signage was supposedly in compliance with MIT's standards. There was no evidence to the contrary.

[44] According to Mr. Thompson, Mulder Construction has had a written policy in place since 2008 stipulating that flaggers are not to use cell phones, walkmans, iPods or any other such handheld devices while they are on duty. Mr. Thompson testified that flaggers were reminded regularly about that policy. Mr. Thompson considers it to be a serious safety issue and flaggers have lost their jobs as a result of failing to follow the policy.

[45] Mr. Thompson also testified that flaggers are instructed to stand on the shoulder of a road, if there is one. If there is no shoulder, flaggers are to stand at the edge of the paving.

[46] Mr. Thompson confirmed that there were no signs erected at or near the construction on PR 207 that provided information such as "Be Prepared to Stop," "Slow - Lane Closure Ahead" or "Two Way Traffic Reduced to One Lane Ahead."

[47] Mr. Thompson testified that WSH had done an investigation of the collision. However, to date he has not received a copy of the report that was apparently prepared. He testified that he had requested a copy of the report, but WSH has refused to release it until these proceedings are finished. Mr. Thompson is therefore not aware of any recommendations that WSH may have made arising from the collision.

[48] In his written report, and in his testimony at the preliminary hearing, Constable Bernardin provided his opinion with respect to the collision. Constable Bernardin concluded that Ms. Murray had been standing in the middle of the northbound lane of traffic. When the accused saw Ms. Murray, he hit the brakes and the vehicle began to skid. The wheels on the vehicle locked so that it could not be steered. The vehicle skidded until it struck Ms. Murray. As a result of the collision, Ms. Murray was thrown over 38 meters.

[49] In Constable Bernardin's opinion, the accused was driving at a minimum speed of 112 km/h immediately before the collision. When the accused's vehicle struck Ms. Murray it was travelling at 89 km/h.

[50] As I indicated previously, the accused testified on his own behalf. He is at present 70 years of age. He confirmed that he has never been convicted of any offence under ***The Highway Traffic Act*** or the ***Criminal Code***.

[51] The accused testified that he owns his own business in Lorette, Manitoba. That is a community that is some distance south of TCH 1. The accused lives on PR 207, near Dugald, Manitoba, which is north of the scene of the collision.

[52] According to the accused, prior to October 18, 2010, he drove PR 207 to and from work every day and he had done so for some years. Normally he drove to work between 8:30 and 9:00 a.m. The business stayed open until 9:00 p.m.

[53] The accused was aware of the construction zone. However, usually when the accused drove home, north on PR 207, it was much later in the day than when he was driving on the day of the collision and there were no construction workers around. On the day of the collision, he was driving home earlier than usual.

[54] The accused testified that the normal speed limit on PR 207 was 90 km/h. The speed limit did reduce to 70 km/h for a short distance immediately north of and south of the intersection of TCH 1 and PR 207 and it increased again to 90 km/h.

[55] When he was driving north, the accused slowed down for the 70 km/h zone. He then accelerated to what he believed to be approximately 90 km/h. He did not specifically look at his speedometer. He estimated the speed based upon the usual speed that he drives on PR 207 and the feel of his vehicle.

[56] The accused testified that, while driving north, he saw the sign that read "Maximum 60 When Passing Workers." However, he did not see any workers in the vicinity and therefore he kept driving at the same speed.

[57] The accused also testified that he saw the sign with the picture of the flag person. However, he did not see any flagger in the vicinity.

[58] According to the accused, he thought that he had slowed down slightly when he saw the two signs. He then suddenly saw Ms. Murray in front of him, standing in the middle of his lane of traffic. He still does not know from where she came. The accused believes that there may have been another car parked at the side of the road and that Ms. Murray may have walked out from behind that car.

[59] The accused testified that he immediately applied the brakes. He attempted to switch lanes but was unable to do so. Presumably his wheels had locked in the manner that Constable Bernardin had described. The accused's vehicle hit Ms. Murray in the midst of the skid. Once the vehicle had stopped, the accused immediately pulled over to the side of the road.

[60] The accused admitted that he became hysterical. He remembers walking around the scene and crying. He told the R.C.M.P. officer that he did not see Ms. Murray and that he had no idea from where she had come. The accused admitted that he went on to say that, if Ms. Murray died, he did not want to live.

[61] The accused testified that he believed, and still believes, that he was within the speed limit at the time of the collision. He does not think that he was going 112 km/h.

[62] The accused emphasized the traumatic effect that Ms. Murray's death has had upon him. He finally sought counselling because of the extreme remorse that he feels.

ANALYSIS

[63] Section 249(1)(a) defines the offence of dangerous operation of a motor vehicle. It provides:

> **Dangerous operation of motor vehicles, vessels and aircraft**
> 249. (1) Every one commits an offence who operates
>
> > (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;
>
> . . . . .

[64] In ***R. v. Beatty***, 2008 SCC 5, [2008] 1 S.C.R. 49, the Supreme Court of Canada clarified what the Crown must prove in order for an accused to be found guilty of dangerous driving. The trier of fact, which in this case is me, must be satisfied beyond a reasonable doubt that the accused's manner of driving amounted to a marked departure from the standard of care that a reasonably prudent person would observe in the accused's situation. A mere departure from the standard of care of a reasonably prudent person may be sufficient for a

person to be found civilly liable. But it is not sufficient for a person to be found guilty of a criminal offence for which the person faces penal consequences.

[65] Charron J. wrote the majority judgment. McLachlin C.J.C. wrote a concurring minority judgment. Fish J. wrote a third judgment. The essence of the disagreement between the three judgments relates to the application of the marked departure standard to the *actus reus* and the *mens rea* for the offence of dangerous driving.

[66] Notwithstanding the differences of opinion, there is general agreement amongst all three judgments that the consequences that may have resulted from an accused's manner of driving is not relevant in determining whether the accused drove dangerously. Although Ms. Murray's death was the tragic result of the collision, I cannot consider the fact that she died in deciding whether the accused is guilty.

[67] According to the majority judgment of Charron J. (at para. 49), if the trier of fact is not satisfied beyond a reasonable doubt that the accused's manner of driving was a marked departure from that of a reasonably prudent driver, no further analysis is necessary. The accused must be found not guilty.

[68] McLachlin C.J.C. wrote (at para. 69) that, in her view, a momentary lapse of attention without more evidence does not establish the offence of dangerous driving.

[69] The Manitoba Court of Appeal applied the ***Beatty*** decision in ***R. v. McCaughan (C.J.)***, 2009 MBCA 14, 236 Man.R. (2d) 188. In overturning the

conviction of the accused for the offence of dangerous driving causing death, and in finding the accused not guilty, MacInnes J.A. followed the reasoning of Charron J. in ***Beatty***.

[70] In ***R. v. Roy***, 2012 SCC 26, [2012] 2 S.C.R. 60, the Supreme Court of Canada applied ***Beatty*** and reiterated the elements of the offence of dangerous driving. Cromwell J. wrote (in para. 28):

> .... The care exhibited by the accused is assessed against the standard of care expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a marked departure from that norm. ....

[71] In describing the criminality of dangerous driving, Cromwell J. wrote (at para. 30):

> A fundamental point in *Beatty* is that dangerous driving is a serious criminal offence. It is, therefore, critically important to ensure that the fault requirement for dangerous driving has been established. Failing to do so unduly extends the reach of the criminal law and wrongly brands as criminals those who are not morally blameworthy. <u>The distinction between a mere departure, which may support civil liability, and the marked departure required for criminal fault is a matter of degree. The trier of fact must identify how and in what way the departure from the standard goes markedly beyond mere carelessness.</u>
>
> [emphasis added]

[72] In describing the *actus reus* of the offence of dangerous driving, Cromwell J. wrote (at para. 34) that the question for the court to determine is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances.

[73] Cromwell J. went on to write (in para. 34):

> .... It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value (*Beatty*, at paras. 31 and 34). Accidents caused by these inherent risks materializing should generally not result in criminal convictions.
>
> [emphasis added]

[74] With respect to the *mens rea* of the offence, Cromwell J. wrote (in para. 36):

> The focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all of the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances.

[75] In view of the fact that the accused testified on his own behalf, it was submitted on behalf of the accused that the Supreme Court of Canada decision of ***R. v. W.(D.)***, [1991] 1 S.C.R. 742 applies. That judgment provides that I must follow a three step process in deciding whether the accused is guilty.

[76] The first step is for me to decide whether I believe the accused. If I do, I must find him not guilty.

[77] If I do not believe the accused, the second step is for me to decide whether the accused's evidence raises a reasonable doubt. If it does, again I must find the accused not guilty.

[78] The third step is for me to decide, if I do not believe the accused, and if his evidence does not raise a reasonable doubt, whether I am satisfied beyond a reasonable doubt of his guilt based on all of the other evidence.

[79] With respect to the first step and the second step of the ***W. (D.)*** analysis, I do find that generally I believe the accused. I am satisfied that he was driving with due care and attention. I accept his testimony that he saw the signage of the reduced speed limit when passing workers and the warning sign for the presence of flaggers. But he did not see any workers or flaggers in the vicinity.

[80] The only part of the accused's evidence that I cannot accept is his estimation that he was driving at a speed no more than 90 km/h. I am satisfied beyond a reasonable doubt that Constable Bernardin's opinion of speed of at least 112 km/h is correct. Constable Bernardin came to that conclusion based upon the length of the skid marks after the accused braked and the mathematical formula that he applies in such situations. His opinion and the basis for it is not refuted.

[81] I therefore find that, for this first step in the ***W. (D.)*** analysis, I do not believe that the accused's estimate of his speed is accurate. There is no evidence that his vehicle had cruise control or, if it did, that the cruise control was activated. By the accused's own admission, he was not really watching his speedometer.

[82] With respect to the second step of the ***W. (D.)*** analysis, the accused's testimony about his estimated speed does not raise a reasonable doubt with me.

[83] Notwithstanding these findings, in applying the third step of the ***W. (D.)*** analysis, I do find that I am not satisfied beyond a reasonable doubt that the accused is guilty of dangerous driving. In my view, there is insufficient evidence that the accused's manner of driving was a marked departure from the standard of care expected of a reasonably person in the circumstances.

[84] It is the Crown's position that the speed limit throughout the construction zone was 60 km/h. By not slowing down when he entered the construction zone, and by maintaining a speed at or above the speed limit of 90 km/h, the accused's manner of driving was a marked departure from that of the reasonable person. Constable Bernardin implied that he also is of the opinion that the relevant speed limit for the accused at the time of the collision was 60 km/h.

[85] By not slowing down when he entered the construction zone, and by travelling at a speed of at least 112 km/h, the Crown submits that the accused's manner of driving was a marked departure from that of a reasonably prudent person. According to the Crown's argument, in certain circumstances, excessive speed alone on the part of an accused can be sufficient for the accused to be found guilty of dangerous driving.

[86] One of the decisions that the Crown relies upon is ***R. v. Manty (C.)***, 2006 MBCA 25, 201 Man.R. (2d) 310, wherein the Manitoba Court of Appeal upheld conviction of the accused on a charge of dangerous driving. I am satisfied that ***Manty*** is distinguishable. Firstly, according to ***Manty*** (at para. 15), the

accused's speed was not an issue. Secondly, ***Manty*** was decided before both ***Beatty*** and ***Roy***.

[87] In my view, the other two decisions that the Crown relies upon are also distinguishable from this case. In the Ontario Court of Appeal decision of ***R. v. M.K.M.*** (1998), 35 M.V.R. (3d) 319, 1998 CanLII 1324, although the accused was driving at an excessive speed, he also was found to have been driving aggressively and engaging in "horseplay." Witnesses testified that the accused was driving too fast.

[88] In the British Columbia Court of Appeal decision of ***R. v. Smillie (C.J.)***, 2003 BCCA 486, 186 B.C.A.C. 103, the accused was driving at an excessive speed on a dark, rainy night. He lost control of his vehicle. The surrounding circumstances obviously contributed to the finding that the accused was driving dangerously.

[89] Furthermore, as with ***Manty***, both ***M.K.M.*** and ***Smillie*** were decided prior to ***Beatty*** and ***Roy***. Whether ***Manty***, ***M.K.M.*** and ***Smillie*** would have had the same result, if the respective courts that decided them were aware of the clear definition in ***Beatty*** and ***Roy*** of what constitutes dangerous driving, is speculation.

[90] I am not satisfied beyond a reasonable doubt that the speed limit applicable to the accused was 60 km/h. I therefore do not accept the Crown's submission or the opinion of Constable Bernardin in that regard. The relevant sign, that the accused testified that he saw, indicates that the speed limit is

60 km/h when passing workers. This means to me that the accused was not to exceed 60 km/h only if there were workers in the immediate vicinity of the location where he was driving.

[91] According to the evidence before me, Ms. Murray was flagging at a location that was some distance away from the actual construction work. There is no evidence of the actual measured distance between where Ms. Murray was doing her flagging and where the actual construction was taking place.

[92] The only evidence that is before me, both from Mr. Doerksen and from Mr. Welchinski, is that the construction work was actually being done at an estimated distance of at least 100 meters and maybe as much as 200 meters away from where Ms. Murray was flagging. In my view, this is a significant distance and I have no explanation for why Ms. Murray was flagging that far away from the location of the actual construction.

[93] If Ms. Murray had been flagging at a location much closer to the work site, at a point where a driver could see the workers, the speed limit of 60 km/h might apply. I am not satisfied beyond a reasonable doubt that it does apply to the location where Ms. Murray was flagging.

[94] Although Mr. Welchinski believes that he was driving at a speed of approximately 80 km/h, in view of his testimony that he and the accused were driving at approximately the same speed, Mr. Welchinski may very well have been driving at a speed of or in excess of 90 km/h as well. Both the accused and Mr. Welchinski admitted that they were not watching their speedometers

and were basing their respective speeds upon the speed at which they normally drive PR 207 and the feel of their respective vehicles.

[95] I am not satisfied that driving at a speed of approximately 112 km/h with good visibility and a dry highway, when there were no workers in the immediate vicinity, was a marked departure from the manner in which a reasonably prudent person would have driven when the wording on the sign is that 60 km/h is the speed limit only when passing workers. If it was intended that the speed limit of 60 km/h applied throughout the construction zone, whether workers were present or not, the sign should have said that.

[96] Other than the accused's speed, there is no evidence that there was anything that was unusual or potentially dangerous about the accused's manner of driving. The only issue is the speed that he was travelling. Although I am satisfied that the accused was above the speed limit on PR 207 of 90 km/h, I reiterate that I am not satisfied that the speed that the accused was driving was a marked departure from the speed that a reasonably prudent driver would have driven in the circumstances of this case.

[97] Notwithstanding that the accused did not see Ms. Murray until it was too late to stop or to avoid her, I cannot conclude that he was not keeping a proper lookout or that his failure was a marked departure from that of a reasonably prudent driver. Ms. Murray was in the middle of the northbound lane of traffic. According to Mr. Thompson, this was contrary to instructions in that she should have been on the shoulder or the edge of the road.

[98] Although the accused did not testify specifically as to where he thought any flagger might be, I am satisfied that Ms. Murray was in a location that a reasonably prudent driver would not have expected her to be. That is another factor in my finding that the accused's manner of driving was not a marked departure from that of a reasonably prudent driver.

[99] It was submitted on behalf of the accused that Ms. Murray was listening to an iPod. This also was contrary to the instructions of her employer. Whether Ms. Murray was actually listening to the IPod is unknown. Nevertheless, there is no question that she had inserted the ear phones into both ears. This undoubtedly impacted her hearing, her concentration and her cognizance for oncoming traffic.

[100] It is the position of the defence that, although contributory negligence is not a defence to the offence of dangerous driving, Ms. Murray's use of an IPod is one of the circumstances that I should consider in deciding whether the accused was driving dangerously. I was not provided with any judicial authorities on that specific issue.

[101] I do not have to decide that issue in this case. I reiterate that I am not satisfied that the accused's manner of driving was a marked departure from that of a reasonably prudent person.

[102] I reiterate that there is no question that the results of the accused's conduct were tragic. Nevertheless, the Supreme Court of Canada has made it

very clear in both ***Beatty*** and ***Roy*** that, in deciding whether the accused drove dangerously, I cannot consider the tragic results of the collision.

CONCLUSION

[103] For the foregoing reasons, I find that I am not satisfied beyond a reasonable doubt of the guilt of the accused. I therefore find him not guilty.

Abra, J.